OCBC BANK (MALAYSIA) BHD.

v.

KREDIN SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-642-1995]
23 APRIL 1997

CIVIL PROCEDURE: *Res judicata - Estoppel - Cause of action estoppel - Issue estoppel - Distinction - Whether an abuse of process to raise matters which could and should have been litigated in earlier proceedings - Whether applicable to every point which properly belonged to the subject of litigation which the parties might have brought forward at the time*

The appellant had given the respondent a loan facility of RM14.45 million ('the loan') which was secured by a charge ('the charge') over some land ('the land'). The respondent defaulted on the loan and the appellant brought an action ('A1') against the respondent and its two guarantors. Thereafter, the appellant initiated a charge action ('A2') and obtained therefrom an order for sale in respect of the land to satisfy the sum of RM19,807,584.93 which was due and owing from the respondent. The respondent appealed to the Supreme Court against the order for sale but subsequently withdrew its appeal. Thereafter, the appellant obtained an O. 14 judgment for the sum of RM19,807,584.93 in respect of A1.

The respondent then filed an action ('R1') against the appellant praying for, *inter alia*, orders to: (i) set aside the order for sale; (ii) to restrain the appellant from disposing of the land; and (iii) to delete and cancel the charge. However, upon the appellant's application and after an *inter partes* hearing, R1 was set aside. The respondent then filed another action ('R2') to set aside the order for sale. In response, the appellant applied to strike out R2 under either O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') or the inherent jurisdiction of the Court. This application was dismissed and the appellant appealed to the instant Court. Counsel for the appellant submitted, *inter alia*, that R2 was an abuse of process in that it sought to raise matters which could and should have been litigated in the earlier proceedings. Counsel for the respondent, however, contended that *res judicata* applies only in regard to 'cause of action estoppel' and not 'remedy estoppel' as an order for sale is not a judgment and, accordingly, R2 should remain as long as the respondent could show an arguable case.

Held:
Per Abdul Malek Ahmad JCA

[1] The plea of *res judicata* encompasses two distinct forms of estoppel, ie, 'cause of action estoppel' and 'issue estoppel'. 'Cause of action estoppel' arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. 'Issue estoppel' represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Thus 'issue estoppel' has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.

[2] The proper forum for the respondent to raise the issue (on the interest payable) was before the Judge who granted the order for sale. However, the respondent did not do so. Subsequently, the respondent had another opportunity to canvass the same point at the appeal level but it chose to withdraw its appeal. And again in R1 (which was an action to set aside the order for sale), the respondent did not raise the issue. Consequently, the doctrine of *res judicata* would apply as both R1 and R2 sought the same basic remedy. The respondent should have raised the issue in R1 and not in R2 as it did. In the result, the respondent should be shut out from raising in a subsequent action, i.e. R2, the issue which it could, and should, have raised in the earlier proceedings.

[Appellant's appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

SIVIL PROSEDUR: *Res judicata - Estopel - Estopel kausa tindakan - estopel isu - Perbezaan - Samada suatu penyalahgunaan proses untuk membangkitkan perkara-perkara yang boleh dan seharusnya dilitigasikan dalam prosiding yang lebih awal - Samada terpakai kepada setiap perkara yang secara wajarnya kepunyaan perkara litigasi yang mana pihak-pihak tersebut mungkin telah bawa ke hadapan di waktu itu*

Perayu telah memberikan responden satu kemudahan pinjaman sebanyak RM14.45 juta ('pinjaman') yang mana dijamin oleh satu gadaian ('gadaian') ke atas beberapa tanah ('tanah'). Responden telah memungkiri pinjaman dan perayu telah memulakan tindakan ('A1') terhadap responden dan kedua-dua penjaminnya. Kemudiannya, perayu telah memulakan satu tindakan gadaian ('A2') dan mendapatkan daripadanya satu perintah untuk jualan bagi tanah tersebut bagi menjelaskan jumlah sebanyak RM19,807,584.93 yang mana terhutang dan kena dibayar oleh responden. Responden telah merayu kepada Mahkamah Agung terhadap perintah untuk jualan tetapi kemudiannya telah menarik balik rayuannya. Selepas itu, perayu telah mendapatkan satu penghakiman A. 14 bagi jumlah sebanyak RM19,807,584.93 berhubung dengan tindakan A1.

Responden kemudiannya telah memfailkan satu tindakan ('R1') terhadap perayu memohon untuk, antara lainnya, perintah-perintah untuk: (i) mengenepikan perintah untuk jualan; (ii) menghalang perayu daripada melupuskan tanah tersebut; dan (iii) membatalkan gadaian. Walaubagaimanapun, atas permohonan perayu, dan selepas perbicaraan *inter partes*, R1 telah diketepikan. Responden kemudiannya telah memfailkan satu lagi tindakan yang lain ('R2') untuk mengenepikan perintah untuk jualan. Sebagai jawapan, perayu telah memohon untuk membatalkan R2 di bawah samada A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') atau bidangkuasa sediaada Mahkamah. Permohonan ini telah ditolak dan perayu telah merayu kepada Mahkamah ini. Peguam bagi pihak perayu berhujah, antara lainnya, bahawa R2 adalah suatu penyalahgunaan proses iaitu ianya cuba membangkitkan perkara-perkara yang boleh dan seharusnya dilitigasikan dalam prosiding-prosiding yang lebih awal. Peguam bagi pihak responden walaubagaimanapun, telah menegaskan bahawa *res judicata* terpakai hanya berhubung dengan "cause of action estoppel" dan bukannya "remedy estoppel" oleh kerana sesuatu perintah untuk jualan bukanlah merupakan suatu penghakiman dan, berikuttan itu, R2 seharusnya kekal asalkan responden dapat menunjukkan suatu kes yang boleh dihujahkan.

Diputuskan:
Oleh Abdul Malek Ahmad JCA

[1] Rayuan *res judicata* melingkungi dua bentuk estopel, iaitu, "cause of action estoppel" dan "issue estoppel". "Cause of action estoppel" berbangkit di mana kausa tindakan dalam prosiding-prosiding yang terkemudian adalah serupa dengan prosiding-prosiding yang awal, yang terkemudian adalah antara pihak-pihak yang sama atau privi-privi mereka dan melibatkan hal-perkara yang sama. Dalam kes yang sedemikian halangan adalah mutlak dalam kesemua perkara yang diputuskan kecuali fraud atau pakatan sulit didakwa, hingga mewajarkan pengenepian penghakiman yang lebih awal. "Issue estoppel" mewakili suatu perlanjutan doktrin res judicata untuk

memasukkan suatu halangan ke atas litigasi yang berikutan bukannya terhadap kesemua isu-isu yang dibicarakan, di mana resolusinya adalah penting bagi penentuan prosiding yang lebih awal tetapi juga "to every point which properly belonged to the subject of litigation", dan yang mana pihak-pihak tersebut, jika lebih berhati-hati, mungkin telah kemukakan pada waktu itu. Dengan itu "issue estoppel" telah dilanjutkan untuk meliputi bukan sahaja kes di mana sesuatu perkara telah dibangkitkan dan secara khususnya ditentukan dalam prosiding-prosiding yang lebih awal, tetapi juga kes di mana dalam prosiding yang berikutan percubaan dibuat untuk membangkitkan satu perkara yang mungkin tetapi tidak dibangkitkan dalam prosiding yang awal itu.

[2] Forum yang wajar bagi responden membangkitkan isu (mengenai faedah yang kena dibayar) adalah di hadapan Hakim yang telah memberikan perintah untuk jualan. Bagaimanapun, responden telah tidak berbuat sedemikian. Berikutan itu, responden mempunyai satu lagi peluang yang lain untuk mengenengahkan perkara yang sama di peringkat rayuan tetapi sebaliknya ia memilih untuk menarik-balik rayuannya. Dan sekali lagi dalam R1 (yang mana adalah suatu tindakan untuk mengenepikan perintah untuk jualan), responden telah tidak membangkitkan isu tersebut. Akibatnya, doktrin res judicata akan terpakai kerana kedua-duanya R1 dan R2 cuba untuk mendapatkan remedi asas yang sama. Responden seharusnya membangkitkan isu dalam R1 dan bukannya dalam R2 sepertimana yang telah dilakukan. Hasilnya, responden seharusnya tidak dibenarkan daripada membangkitkan dalam suatu tindakan yang kemudian, iaitu R2, isu, yang ianya boleh dan seharusnya telah bangkitkan dalam prosiding-prosiding yang lebih awal.

[Rayuan perayu dibenarkan.]

Cases referred to:

Kandiah Peter v. Public Bank Bhd. [1993] 4 CLJ 332 ***(dist)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 2 CLJ 88 ***(refd)***

Brisbane City Council and Anor. v Attorney-General for Queensland [1978] 3 All ER 30 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn. Bhd. [1995] 2 CLJ 701 ***(refd)***

C. (A Minor) v. Hackney London Borough Council [1996] 1 WLR 789 ***(foll)***

Low Lee Lian v. Ban Hin Lee Bank [1997] 2 CLJ 36 ***(foll)***

Richland Trade & Development Sdn. Bhd. & Ors. v. United Malayan Banking Corp. Bhd. [1996] 4 MLJ 233 ***(cit)***

Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581 ***(foll)***

Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney General for Queensland (at the relation of Arthur Thomas Scurr and William Percival Boon) [1979] AC 411 ***(refd)***

Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] 1 CLJ 548 ***(foll)***

Legislation referred to:
National Land Code 1965, s. 275(1)(c)
Rules of the High Court 1980, O. 18 r. 19, O. 83 r. 3, (6), (7)

Other source referred to:
Spencer Bower and Tuner's The Doctrine of Res Judicata, 2nd Edn., Chapter 11, p. 20

[Appeal from High Court Malaya, Kuala Lumpur; Suit No: S3-22-583-1992]

For the appellant - Porres Royan (John Mathew with him); M/s. Shook Lin & Bok
For the respondent - K.S. Narayanan (Saranjit Singh with him) M/s. Jayaraman, Ong & Co.

JUDGMENT

Abdul Malek Ahmad JCA:

The doctrine of *res judicata* has been expounded in many an authority but, like other legal doctrines, continues to be argued before the Courts as each case must depend on its particular facts. In this appeal before us, despite a well reasoned judgment, we could not, having carefully considered the arguments canvassed before us, agree with the learned trial Judge who held that the doctrine was not applicable. We, therefore, allow the appeal with costs here and below and order that the deposit be refunded to the appellant.

The sequence of events are not exactly in dispute. On 22 June 1982, the appellant as lender had executed a loan agreement with the respondent granting the latter a RM14.45 million loan which loan facility was secured by a charge over five pieces of land (hereinafter 'the charged properties') dated 31 May 1982. The respondent had defaulted on the loan whereupon the appellant had commenced an action in 1986 *vide* Kuala Lumpur High Court Civil Suit C23-948-86 (hereinafter 'the first action') against the respondent and the two guarantors.

A charge action was initiated on 25 April 1986 *vide* Kuala Lumpur High Court Originating Summons No. 31-1069-86 (hereinafter 'the second action') asking that the charged properties be sold by public auction under the National Land Code to satisfy the sum of RM19,807,584.93 due to the appellant as at 31 December 1985 together with interest thereon at the rate of 14.75% per annum from l January 1986 to the date of payment and the usual consequential orders.

The order for sale was accordingly granted by N.H. Chan, J. (as he then was) on 16 July 1987 and the auction date was fixed on 14 March 1988. The respondent had appealed to the Supreme Court against that order but withdrew it on the hearing date namely 7 March 1988 whereupon that appeal was dismissed with costs.

As for the first action, the appellant obtained an O. 14 judgment from the Senior Assistant Registrar on 26 September 1988 which categorically states that the respondent and one of the two guarantors are to pay RM19,807,584.93 to the appellant with interest at the rate of 14.75 per cent from 1 January 1986 to the date of full payment. The appeal against that order was dismissed with costs by Dr. Zakaria Mohd. Yatim J. (as he then was) on 10 July 1989.

In April 1990, the respondent filed a civil action against the appellant *vide* Kuala Lumpur High Court Civil Suit D322-1288-90 (hereinafter 'the third action') where the statement of claim ran into 24 four pages. The prayers sought were:

a) to set aside the order for sale in the second action;

b) to consolidate this action, the second action and two other actions involving the same parties (Kuala Lumpur High Court Civil Suit S3-23-62-88 and Kuala Lumpur High Court Civil Suit S3-22-1125-92) which are to be heard subsequently as one matter;

c) to restrain the appellant from disposing, interfering and/or attempting to dispose of by auction, sale or otherwise howsoever through its agents, solicitors, servants or whomsoever the charged properties;

d) to delete and cancel the charge over the charged properties at the direction of the Court by the Registrar of Land Titles and to deposit the original documents of titles with the Court until determination of the issue of damages and if the said damages so held by the Court exceed the alleged claim of the appellant, the said damages are to be affected towards the alleged claim and the titles to the charged properties are to be returned to the respondent;

e) to reinstate the approved status of the said charged properties as a whole assembly and all documents where necessary to be executed by the Senior Assistant Registrar on behalf of the appellant to enable them to be valued and proceed as a whole block to the developer;

f) for all necessary interim orders and directions necessary to give effect;

g) damages on a punitive, remedial, restorative and exemplary basis;

h) interest;

i) costs; and

j) any other relief.

The appellant applied to set aside the third action and this was granted by the Court, after an *inter partes* hearing, on 25 June 1992. It is pertinent to

point out that the relevant order states that the affidavits in two other actions namely Kuala Lumpur High Court Civil Suit C23-948-86 ('the first action') and Kuala Lumpur High Court Civil Suit S6-23-62-88 had also been taken into consideration. The order had also ordered costs against the respondent apart from dismissing two injunctions granted on 18 September 1990 and 15 April 1992 respectively for which the respondent was ordered to pay damages to be assessed by the Senior Assistant Registrar to the appellant. The oral application for stay had been dismissed with costs.

The respondent then filed High Court Civil Suit S3-22583-1992 (hereinafter 'the fourth action') in August 1992. Essentially, the fourth action again sought to set aside the order for sale. The appellant accordingly had applied to strike out the fourth action under O. 18 r. 19 of the Rules of the High Court 1980 (hereinafter 'the Rules') or under its inherent jurisdiction but this was dismissed on 12 August 1995. Hence this appeal.

The appellant's grounds were that, by bringing the fourth action, it was an abuse of the process of the Court, was scandalous, frivolous or vexatious, and was prejudicial and embarrassing.

Learned Counsel for the appellant had with his customary eloquence argued that what the respondent was seeking to do was to set aside the order for sale in the second action granted on 16 July 1987 on the alleged basis that the liability for interest imposed by it is not sanctioned by the charge agreement. In that connection, the respondent contends that by doing so, the appellant had perpetrated fraud against them.

Learned Counsel observed that this was the second attempt by the respondent to set aside the relevant order for sale. And, he added, this was despite the relevant order for sale being obtained after an interpartes hearing, the Supreme Court dismissing the appeal against that order and a similar application, in the third action, being dismissed by the High Court after an *inter partes* hearing.

To support his argument that the action was an abuse of process, he had referred to s. 257(1)(c) of the National Land Code which requires the order for sale to specify the total amount due to the chargee at the date on which the order is made. Order 83 r. 3 of the Rules provides for the filing of an affidavit and para. (6) thereof states that where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and the particulars mentioned in para. (3) thereof must be given namely the amount of the advances, the amount of the repayments, the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit, and the amount remaining due under the charge. Paragraph (7) of r. 3 of the same order states that

where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

Accordingly, the amount claimed by the appellant in the charge action in which interest is levied has to be deposed to on affidavit. All other relevant documents namely the statutory notice, the originating summons, the affidavit in support and the affidavit filed under O. 83 of the Rules had raised and sought the interest. This was, therefore, a material issue in the course of the charge action and the respondent should have stated their stand then or at the appeal which they subsequently withdrew.

Learned Counsel for the respondent, with his usual candour, remarked that they were not the solicitors in charge when the order for sale and when the withdrawal of the appeal in the second action took place. He reiterated that none of the issues now submitted were raised then and the third action had nothing to now submitted were raised then and the third action had nothing to do with the issue they were raising now for the first time which was unjust enrichment. In that earlier action, he stressed, the action was for damages for fraud and other grounds, different from the one raised now, and one of the remedies was to set aside the order for sale.

He argued that *res judicata* is only as regards cause of action estoppel not remedy estoppel as an order for sale is not a judgment as decided in *Kandiah Peter v. Public Bank Bhd.* [1993] 4 CLJ 332; [1994] 1 MLJ 119 and since this was an application under O. 18 r. 19 of the Rules, he added, as long as the respondent can show an arguable case, the action should remain. He also submitted that the order for sale had since been stayed.

He had cited para. 73 of the judgment of the Federal Court in *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 2 CLJ 88 at p. 94 which was actually an extract of the judgment from the Australian case of *Brisbane City Council and Anor. v Attorney-General for Queensland* [1978] 3 All ER 30. Wan Sulaiman FJ had said:

> The defence of *res judicata* was considered and disposed of at p. 425, and we cite:
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> > The second defence is one of *res judicata.* There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v.*

Commissioner of Taxation [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
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> This reference to "abuse of process" had previously been made in *Greenhalgh v. Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.
>
> In their Lordships' opinion there is no room for application of this doctrine here.

Learned Counsel had also quoted a passage from *Kerajaan Malaysia v. Jasanusa Sdn. Bhd.* [1995] 2 CLJ 701; [1995] 2 AMR 1477 at p. 1494 which states:

> It is well settled law that the exercise of such a discretion will be interfered with by an appellate Court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the Judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of law or fact. More particularly, the fact that we as an appellate Court might have exercised the discretion differently is beside the point and will not therefore constitute a sufficient ground for overturning the Judge's decision to grant the limited stay.

In reply, learned Counsel for the appellant likened a situation where a client sues a solicitor for negligence. There are two causes of action, he said, in contract and in tort. What if the client sues the solicitor in contract and the action is dismissed. Can he file another action on the same facts in tort? Similarly here, he pointed out, the grounds in the fourth action to set aside the order for sale may be different but this cause of action could have been framed in the third action.

He relied on *C (A Minor) v. Hackney London Borough Council* [1996] 1 WLR 789 at pp. 792 and 793 where Simon Brown LJ said:

> Before turning to consider these reasons and Counsel's arguments upon the appeal, it is convenient first to indicate something of the law governing this issue.

From the several authorities referred to during the course of argument I derive these central principles.

(1) The considerations of public policy underlying the plea of *res judicata* are enshrined in two Latin maxims: *nemo debet bis vexari pro una et eadem causa and interest reipublicae ut sit finis litium.*

(2) The plea of *res judicata* encompasses two distinct forms of estoppel: cause of action estoppel and issue estoppel.

(3) "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment:" *see Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 104.

(4) Issue estoppel represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time:" see *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 QB 630, 643, per Diplock LJ, quoting from *Henderson v. Henderson* [1843] 3 Hare 100, 115. As Lord Keith of Kinkel put it in *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93, 106:

> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.

(5) "The point" which might have been but was not raised in the earlier proceedings may itself be a cause of action. In *Talbot v. Berkshire County Council* [1994] QB 290, 301 Mann LJ spoke of the rule as "a salutary one," observing that "it prevents prolixity in litigation and encourages the earliest resolution of disputes."

(6) In issue estoppel cases, the plea of *res judicata* will not be applied where to do so would cause injustice. The "special circumstance" (the phrase used in several of the authorities) justifying the non-application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v. National Westminster Bank Plc.* [1991] 2 AC 93) there has been a change or changed perception of the law.

(7) The plea of *res judicata* applies only where the cause of action or issue was and remains between the same parties or their predecessors in title. The single exception to this rule is to be found in the Privy Council decision in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581, where the party held estopped in the subsequent proceedings had not itself been a party to the earlier action. It was, however, a closely related company with common directors and shareholders.

Learned Counsel also referred to the latest Malaysian authority on this point. In *Low Lee Lian v. Ban Hin Lee Bank* [1997] 2 CLJ 36; [1997] 1 MLJ 77, it was propounded at p. 92 that:

> When properly understood, there is therefore nothing in the decision in *Kandiah* that permits a chargor in a subsequent action to set aside an order for sale granted by the Court *inter partes*. That may not be done in the absence of an allegation of fraud in the procurement of the order. See *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143. If a chargor is unhappy with an order for sale made *inter partes*, his only remedy is to appeal against it as has been done in the present case. All that *Kandiah* decides is that the making of an order for sale does not bar an action *in personam* between the same parties.

Learned Counsel for the respondent submitted that *Low's* case contradicted O. 83 r. 3 of the Rules. He said there were special circumstances here citing *Richland Trade & Development Sdn. Bhd. & Ors. v. United Malayan Banking Corp. Bhd.* [1996] 4 MLJ 233 as a case on point.

We agree that a person cannot be shut out from bringing an action and would like to reproduce an extract of Lord Kilbrandon's speech in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor.* [1975] AC 581 at pp. 590 and 591 where he said:

> But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, 115 where the Judge says:
>
> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court

> was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in no. 969 came to be answered Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.

The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257, by Somervell LJ:

> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

Again, a phrase used by Lord Shaw of Dunfermline in delivering the opinion of the Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155, 171, "the present point was one which, if taken, went to the root of the matter on the prior occasion", appears precisely apposite to the failure, in answer to the counterclaim in no. 969, to raise the matters founded on in no. 534 which, if then substantiated, would have been then decisive. An instance of a hard case in which the rule was applied is *In re Koenigsberg* [1948] Ch. 727.

Their Lordships are, accordingly, of opinion that the full Court was right in ordering that the statement of claim in no. 534 be struck out as an abuse of the process of the Court; they will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

We were also aware of the finding in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland (at the relation of Arthur Thomas Scurr and William Percival Boon)* [1979] AC 411 where it was held in dismissing the appeal:

> (3) That the basis of the defence of *res judicata* in its wider sense, by which a party was precluded from raising an issue which he could and should have raised in earlier proceedings, was that to raise such an issue was an

> abuse of process and that (even assuming that in the present case the existence of the trust was known at the time of the earlier proceedings and that there was the necessary identity of parties), since it would have been inappropriate to assert the existence of the trust either in the planning consent appeals or in the 1971 action against the Council, the bringing of the present action was not an abuse of process and the defence failed.

In the present proceedings, it is our considered view that the proper forum for the respondent to raise the issue on the interest payable was before the Judge who granted the order for sale in the second action. This they did not do.

Subsequently, they had the golden opportunity to canvass the same point at the appeal level. Instead, they chose to withdraw the appeal depriving them of their right to raise the same point. Again, in the third action, they did not raise this although the prayer there was also to set aside the order for sale as in the fourth action albeit on different grounds.

Although the Supreme Court decision in *Kandiah Peter v. Public Bank Bhd.* [1993] 4 CLJ 332; [1994] 1 MLJ 119 is to the effect that the doctrine of *res judicata* would not apply where the previous proceedings were only charge final judgment or order, as has been pointed out earlier, a clarification had been made on this point by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank* [1997] 12 CLJ 36; [1997] 1 MLJ 72.

In any case, in *Kandiah Peter's* case, the chargor was not seeking to impeach the earlier order for sale but was only seeking to challenge the validity of the charge documents and the subsequent civil proceedings in which the doctrine was raised was the first after the order for sale. Here, it is the second, as the first was the third action where there was the similar prayer to set aside the order for sale in the second action as in the fourth action. Surely and certainly, the doctrine of *res judicata* would apply here as both the third and the fourth actions seek the same basic remedy and we consider that the respondent should have raised the issue in the third action and not in the fourth action as they had done. Accordingly, the respondent should be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings as per the Supreme Court decision in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] 1 MLJ 494 whilst approving the decision reached in the *Brisbane City Council* case.

In *Spencer Bower and Turner's The Doctrine of Res Judicata*, 2nd Edn., at chapter 11 at p. 20, it is stated as follows:

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21 A *res judicata* is a judicial decision, pronounced by a judicial tribunal. It is of no avail to prove that the alleged *res judicata* was a decision, or even that it was a judicial one, in the sense that it was pronounced according to judicial principles, unless it be also established that it emanated from a judicial tribunal in the exercise of its judicial functions; nor, on the other hand, is it sufficient to shew that it was pronounced by a judicial tribunal, unless it be also shewn that it was a decision, and a judicial one, as distinguished from a termination of the proceedings otherwise than by a judicial decision. It is vital, therefore, to the present inquiry to fix at the outset the proper definition, first, of "judicial tribunal", and then, of "judicial decision".

And at pp. 29 and 30 of the same text it is stated:

What is a judicial decision?

30 In order to establish a *res judicata* on which an estoppel may be founded, it must appear, not only that the person, or body of persons, pronouncing the deliverance constituted a judicial tribunal, but also that what was pronounced amounted to a judicial decision. There must have been both a *judex,* and a *judicium, Bradshaw v. M'Mullan,* [1920] 2 IR 412 HL per Lord Shaw at p. 424, 425, which, for purposes of estoppel, means a decision or determination or adjudication of some question of law or fact, whether such decision takes the form of an express judicial declaration, or is necessarily involved in the command or prohibition which constitutes the judgment or judicial act in its coercive or operative aspect. Everything which answers to this description, by whatever name it may be called (for different phraseology in this respect has been adopted by different tribunals, or by the same tribunal, at different stages in the history of our jurisprudence) is deemed a judicial decison; and nothing which falls short of it (again, irrespective of nomenclature) is so deemed.

In our present circumstances, considering the sequence of events, especially when there was no appeal against the decision in the third action, the respondent could and should have brought this objection against additional interest in the third action. In any case, it is our finding that they can sue the appellant direct without having to set aside the order for sale.

As stated earlier, the appeal is allowed with costs here and below and the deposit refunded to the appellant.

Reported by Gan Peng Chiang